STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY PAUL LAFLAMME,

Defendant-Appellant.

UNPUBLISHED
September 25, 2003

No. 237164
Oakland Circuit Court
LC No. 2000-173918-FH

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

A jury convicted defendant of uttering and publishing forged instruments, MCL 750.249. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of eighteen months to fourteen years' imprisonment. He appeals as of right. We affirm.

I. Facts

This case arises from the presentation of two checks, against a closed account, in exchange for goods at Eldin's Hardware. Paula Lapointe, a store employee, testified that on June 3, 2000, defendant presented a check for approximately $43 in exchange for electrical and plumbing parts. According to Ms. Lapointe, the check was presigned and defendant filled out the name of the store and the amount. The name on the account was Clarkston Cinema. She further recounted that defendant returned two days later and presented a check for $66.01 in exchange for additional merchandise. Ms. Lapointe stated that she could not tell if this check had been presigned, but she did observe defendant write in the name of the store and the amount. The bank returned both checks because the account had been closed in 1999.

Ms. Lapointe subsequently telephoned Lawrence Sefa, the owner of Clarkston Cinema, and spoke with him about the checks. Shortly thereafter, Lawrence Sefa went to Eldin's Hardware to show Ms. Lapointe a photograph of defendant. Ms. Lapointe recognized defendant as the individual who presented the checks. Lawrence Sefa testified that he never signed, presented, or authorized anyone else to present, the checks in question. In fact, he claimed that he had never done any business with Eldin's Hardware. Lawrence Sefa identified the signatures on the checks as "D. Sefa," and stated that his son's name was Daniel Sefa. He then added that

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

the latter was incarcerated in June 2000. Lawrence Sefa noted that some checks were missing after an earlier break-in at his business.

Defendant admitted that he had been in Eldin's Hardware many times, but denied being there on June 3 or 5, 2000. He further denied having any involvement with the bad checks. A defense witness testified that he overheard Lawrence Sefa state that he was "setting . . . Jeff LaFlamme up" in connection with some bad checks.

II. Evidentiary Issues

On appeal, defendant challenges several of the trial court's decisions to admit or exclude evidence. As a general rule, we review a trial court's evidentiary decisions for an abuse of discretion.[1] But a trial court's decision to admit identification evidence will not be overturned on appeal absent clear error.[2]

A. Impeachment

Defendant initially argues that the trial court erroneously limited his impeachment of Lawrence Sefa with regard to the latter's conviction for writing a bad check over $100.[3]

Under MRE 609(a)(1), a party is allowed to present evidence of a conviction for impeachment purposes if "the crime contained an element of dishonesty or false statement . . . ."[4] The crime of knowingly presenting a bad check in exchange for merchandise undoubtedly contains an element of dishonesty or false statement. As such, we find that defense counsel could have properly used Lawrence Sefa's conviction for impeachment purposes.

Nevertheless, reversal is only warranted for the improper exclusion of evidence if such error resulted in a miscarriage of justice.[5] After reviewing the record in this case, we are not convinced that a miscarriage of justice occurred. Defense counsel was allowed to cross-examine Lawrence Sefa concerning his presentation of a check against a closed account. Although Lawrence Sefa denied that the check in fact "bounced," he admitted that his bank had taken the initiative to close his accounts. He further admitted on cross-examination that he was currently facing a charge of fraud. More importantly, we note that the store clerk from the hardware store personally identified defendant as the perpetrator.

B. History of Writing Bad Checks

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[1] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

[2] *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

[3] See MCL 750.131(3)(b)(i).

[4] MRE 609(a)(1).

[5] MCL 769.26; *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001).

Defendant next asserts that the trial court improperly limited his cross-examination of Lawrence Sefa. At trial, defense counsel asked Lawrence Sefa if he had ever written checks that had not cleared. In response to the prosecution's relevancy objection, defense counsel argued that this evidence was "relevant to [Lawrence Sefa's] character." The trial court agreed with the prosecution and ruled the evidence inadmissible under MRE 404.

Evidence of other bad acts is inadmissible to prove a person's propensity to act in conformity therewith.[6] But such evidence may be admissible to show "motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ."[7] Defense counsel in this case failed to identify a purpose, other than character, for the admission of this evidence.[8] Even assuming, arguendo, that the evidence was properly admissible, we find that no miscarriage of justice occurred.[9] As previously noted, the clerk in the store personally identified defendant as the perpetrator. Further, the defense attorney was able to elicit testimony from Lawrence Sefa concerning the fact that the bank had closed his accounts resulting in bounced checks.

C. Photographic Identification

Defendant also opines that the trial court erroneously denied his pretrial motion to preclude Ms. Lapointe's identification of defendant. He argues that the pre-trial identification was tainted because it was based on a highly suggestive identification procedure. We disagree.

"A photographic identification procedure violates a defendant's right to due process of law[] when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."[10] Where a witness is shown only a single image, the witness may tend to believe that the individual being shown represents the guilty party.[11] If such a procedure occurs, the trial court should not admit a subsequent in-court identification of the defendant by that witness absent a showing, on clear and convincing evidence, of an independent basis for the identification.[12]

Notably, *Gray* and the authorities cited by defendant regarding tainted identification procedures in Michigan, all concern improper procedures conducted by governmental agents. Because the instant case involves a private citizen conducting the identification procedure it is distinguishable. We note that there is no record evidence to suggest that this individual was

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[6] MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[7] MRE 404(b)(1); see also *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205, 520 NW2d 338 (1994).

[8] See *VanderVliet, supra* at 74.

[9] See MCL 769.26; *Whittaker*, *supra* at 426.

[10] *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (footnote omitted).

[11] *Id.*

[12] *Id.* at 115.

acting as a government agent. A review of the case law in Michigan further fails to reveal any cases directly on point. Defendant, therefore, is essentially asking this Court to decree that the rules governing potentially tainted identifications be extended to cover the activities of nongovernmental actors. There is no need for us to decide this issue today, as we are satisfied that the record establishes an independent basis for Ms. Lapointe's identification of defendant.

A suggestive lineup is constitutionally defective if after reviewing the surrounding circumstances it appears that there is a substantial likelihood of misidentification.[13] Some of the factors to be considered in making this determination include the witness' opportunity to view the criminal during the crime, the witness' degree of attention, the length between the crime and the confrontation, and the witness' degree of certainty.[14] In this case, Ms. Lapointe testified that she recognized defendant from prior visits to the store. She also explained that she had personally assisted defendant with his purchases. The record shows that Ms. Lapointe was confident in her identification of defendant as the perpetrator. We further note that defendant admitted that he had been to the store repeatedly before the incident in question. Under these circumstances, we are not persuaded, as a matter of law, that Lawrence Sefa's presentation of the photograph to Ms. Lapointe was so suggestive as to throw into doubt the validity of her in-court identification of defendant.

III. Sufficiency of the Evidence

Defendant also challenges the sufficiency of the evidence supporting his conviction and argues that the trial court improperly denied his motion for a directed verdict. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[15] A trial court's decision on a motion for directed verdict is reviewed in a similar manner.[16] "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[17] We note that this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses.[18]

To establish the crime of uttering and publishing, the prosecution must show "that the defendant knew the instrument was false, that he had an intent to defraud, and that he presented the forged instrument for payment."[19] As stated by this Court in *People v Fudge*, "[t]o utter and

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[13] *Hornsby*, *supra* at 466.

[14] See *Gray*, *supra* at 115-116.

[15] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[16] *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

[17] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

[18] *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

[19] *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991); see also MCL 750.249.

publish a forged instrument is 'to declare or assert, directly or indirectly, by words or actions, that an instrument is good.'"[20] Here, defendant argues that there was no evidence that he knew the checks in question contained false information or that he presented them for the purpose of defrauding the hardware store. To support this position, defendant asserts that there was nothing presented to show that Lawrence Sefa was the only authorized signer or specifically that his son, D. Sefa, lacked the authority to sign the checks. He also notes that the prosecution failed to: identify all of the authorized users of the account; show whether these users all agreed to close the account; or explain what, if any, interest D. Sefa had in Clarkston Cinema. Defendant thus claims that reasonable doubt of his guilt remains because he could have believed that "D. Sefa's" signature was valid.

After reviewing the record, we find no merit to defendant's claims. Lawrence Sefa testified at trial that he owned the business against which the checks in question were drawn. He also claimed that the account had been closed in 1999, that he did not authorize anyone to sign the checks in question, and that some checks had been stolen from the business before this case arose. In light of this testimony, defendant's presentation of the checks in exchange for merchandise was strong circumstantial evidence that he did so with knowledge that the checks, despite appearances, were worthless. Speculation as to the existence of other authorized users of the account, despite Lawrence Sefa's testimony, is thus unavailing. It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce; it is not necessary for the prosecution to disprove every reasonable theory of innocence.[21]

IV. Motion for New Trial

Defendant argues that the trial court erred in denying his motion for a new trial. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion.[22] In challenging the trial court's decision on this motion, defendant repeats the sufficiency argument advanced above and cites the use of a tainted identification procedure. Because we have already rejected these arguments, we need not consider them again here. The trial court properly denied defendant's motion.

V. Sentencing

Defendant finally raises several sentencing-related issues. We note, however, that defendant has already served his minimum sentence. "Where a subsequent event renders it

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[20] *People v Fudge*, 66 Mich App 625, 632; 239 NW2d 686 (1976), quoting 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1503, p 1881.

[21] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[22] *People v Lemmon*, 456 Mich 625, 648, n 27; 576 NW2d 129 (1998).

impossible for this Court to fashion a remedy, an issue becomes moot."[23] For this reason, we decline to review defendant's sentencing issues.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin

[23] *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).